

ANSWERS

FOR

John Earl of Sutherland,

TO THE

Petition given in by *John Earl of Crawford.*

THE Petitioner having fully repeated your Lordships Interlocutor of the 23. last Month, reclaims as to one Point only, *viz. That the Prescription of 40 years doth commence from the Act of Parliament 1617, and not from the Decreet of Ranking 1606.* So at last this important Cause is come to two Points in Dispute, to wit, *If the Feminin Succession took place in Dignities?* As to which the Pursuer has given in a Petition. And next, *If the Prescription is to be computed from the Act of Parliament 1617, or from the Decreet of Ranking.*

As to this Point, before the Pursuer make any Answer, he craves leave to observe, *First*, That it has been an Opinion received amongst all Lawyers, that Prescription is *Juris civilis*, and therefore is admitted no where but by express Statute. The Emperor *Justinian* being to treat the Matter of Prescriptions, in the Title *De usu capionibus* in the Institutions, begins in these words, *Jure civile constitutum fuerat ut qui bona fide ab eo qui dominus non erat, cum crediderit eum dominum esse, rem emerit, vel, ex donatione, aliave quavis justa causa acceperit, is eam rem si mobilis erat, Anno ubique uno si immobilis, biennio tantum in italico solo usu capiat, ne rerum dominia in incerto essent,* manifestly referring the original of Prescription to the Civil Law; and indeed it did flow from the Laws of the Twelve Tables.

And it is for the same Reason, that all the different Species of Prescription which obtain in *Scotland*, have been established by special Acts of Parliament; as is evident by the Acts of Parliament, King *James III.* Concerning the Prescription of Obligations.; the Acts of Parliament King *James IV.* Concerning the Prescription of the Summons of Error of Inquests, and from the Acts concerning Retours, Spuilzies, Removings, Holograph Writs, and many others needless to name; and therefore also it is, that *Balfour* who wrote before the Act of Parliament 1617, in his Title of Prescriptions, speaks not one word of the Prescription of heritable Rights; and *Craig* who wrote before the making of that Law, *Lib. 2. Dieg. 1.* acknowledges that we had no such Prescription, and regrets it; my Lord *Stair* Title of Prescriptions, *Numb. 12.* says in express

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Terms,

Terms: " By our ancient Custom there was no place for Prescription in any Case, which hath been helped by our Statutes both as to long and short Prescriptions. And Sir *George Mackenzie* is of the same Mind in his Observations upon the Act of Parliament 1617. And therefore, the Ground now urged so earnestly for the Petitioner, is very new and singular, pretending to establish a Prescription not express in the Act, running from a period before that Law was made; altho it be certain, that Correctory Laws, or Laws which introduce any thing new or beyond the common Observation, are of strict Interpretation. And also, that Laws are not to be extended in *materia odiosa*, such as Prescription, whereby a Party is deprived of his Right without his Consent. And to satisfy the Lords how unfavourable Prescription is, their Lordships will please observe the Decision *Ogilvie contra Lord Ogilvie*, December 23. 1630, where a Contract dated in the 1590, but blank as to the Day and Month, was constructed to be of such a date, as might elide the Exception of Prescription.

And your Lordships will also further please to notice, that Prescription of Heritable Rights was very much against the Grain and Genius of the Laws of *Scotland*, which did extraordinarily favour the preservation of Families and Estates; and therefore it was very long before Prescription in Heritable Rights was admitted: And altho it had been Tabled in the Parliament 1612, yet all that was then done, was to grant a Commission to the next Parliament anent the Prescription of Heritable Rights; as appears by the List of the unprinted Acts subjoined to the Acts of the said Parliament.

But 2^{do}. The Pursuer must also in general observe, that the Petitioner takes it for granted, that the Act of Ranking 1606, was a Title of Prescription which under favour the Pursuer does nowise admit. For albeit the Petitioner will all along have it considered as a Decree of a Sovereign Judicatory *in foro*, yet I do contend, that it was not so much as a Decree, being pronounced by no Judicatory, or by any legal Authority which could so much as be prorogated: For this I presume will be yielded, That no Jurisdiction can be prorogated but what is ordinary. 2^{do}. I contend, that the compearance marked for my predecessor by his Procurator, not being in the Decree of an ordinary Judicature, does not so much as prove his Compearance. 3^{io}. Much less can his Compearance without production of a Mandat or speaking one single word, prejudice my Interest, or import that my Predecessor did prorogate or submit to that Jurisdiction. But 4^{to}. As the Commission granted for Ranking of the Nobility, did confer no Jurisdiction nor Authority to decide in point of Right less or more; so it could be no Title of Prescription, containing in its bosom the Reservation of others Rights and Interests; and indeed, it was not intended, nor does the Commission or Procedure give the least colour to imagin it. The King and his Council for the preservation of the publick Peace, might proceed by way of Expedient for the *interim*, until the Rights of the Parties were urged before an ordinary Judicatory: And this is all that was intended by the foresaid Act, as the Act it self does in more places than one bear.

But 3^{io}. The alledged Prescription as it wants a Title, so it wants a Possession, and both are necessary in Prescription: For from the 1606 till the 1633 *inclusive*, it does not appear, that ever the Earls of *Sutherland* and *Crawford* were together in Parliaments or Councils; and therefore this Prescription so much insisted on, is certainly very defective.



I shall not trouble your Lordships at this time with the general Point, *viz.* How far Prescription can be sustained in such Cases, tho it is pretty evident, that neither do the words of the Act of Parliament 1617 properly comprehend without the help of Interpretation, *jura sanguinis*, or Titles of Honour, or Rights of Precedency; and there do not want instances both at home and abroad of Peers, who having been long called in the Rolls of Parliament under other Designations and in a different Order, or who after Forfaultures of near 100 Years, have for all that assumed the ancient Titles of their Families and their Precedencies; nor has the Petitioner to this day produced any Authors for Prescription in such Cases. It is true, *Tiraquellus* and *Craig* are cited for immemorial Possession, as a manner of acquisition in Matters of Dignity; but then the same *Tiraquellus* expressly rejects the Prescription of 40 Years; and neither of them Asserts, that Prescription makes a Preference in a Competition where more ancient Titles are produced, but only to constitute a Dignity: and it is no less plain, that the Petitioner has no pretence to immemorial Possession after what has been adduced, for clearing the very period of time at which the Petitioner's predecessors were Nobilitated, and the Interruption which happened in the 1572.

These things being in general premised, might superceed the necessity of any particular Answer; but out of respect to the Petitioner, I shall shortly Resume and Answer.

And first, Whereas the Petitioner alledges, *That Prescription founded on Possession and depending upon a Title, must be reckoned from the date of the Title, which the Petitioner says is the Decreet 1606; conform whereunto, he and his Predecessors have possesst; nor can the Act of Parliament 1617 be the terminis a quo, seing the Petitioner has no Title of that date.*

I answer, That since Prescriptions are introduced, they begin to be computed from the date of the Title, yet that is not necessary: For where Interruptions happen, the Prescription is not computed from the date of the Title, but from the Interruption. But as to such Rights as did exist before the Act of Parliament, and which had not at that time been confirmed by 40 Years peaceable possession; the Term from whence the Computation runs, can be no other but the date of the Act of Parliament; because before that Act, there was no Law obliging any party having Right, to interrupt or quarrel a quarrelable Possession, nor any Law giving privilege to such a possession. And in the next place, altho the Act of Ranking 1606, did give the Petitioner the advantage that he might have the Precedency, yet he did not possess it for many years after, nor for any thing yet seen, before the 1661.

Nor can the Possession at all be counted peaceable, seing first, it was interrupted in the 1630 by a Process and Citation; and in the Year 1641, by a Protest marked in the Lists of these Acts, which being marked in these Words, *Protestation Earl of Sutherland anent his Place*, must be understood to have been a Protest against the whole Earls Ranked before him; seing first, he had raised his Process against them all; and in the next place, the Protestation in the year 1641, is marked in the same manner as the Protestation in Anno 1647, which mentions no particular Earls; but is a Protestation, *The Earl of Sutherland anent his Place and Precedency*; and yet by the Extract of that Protestation produced, it is plain, that the Earl of Sutherland did then Protest against all the Earls Ranked before him: And indeed, what can a Protestation for his place

place Import ſels? And tho that Proteſtation taken in the year 1641 be not now produced, yet the Liſt of the Acts is ſufficient to inſtruct it; nor can there be more required, ſeing it is well known, that the Warrants of theſe Parliaments are ſuppreſſed by Authority.

I muſt alſo in this place obſerve to your Lordſhips, That the Earl of *Crawford's* peaceable Poſſeſſion being once interrupted by my Summons, it ſtood ſo interrupted until the Act of Parliament 1685, and for ſeven years after, altho there had been no other Deed of Interruption but that Summons; but ſeing that Summons was followed by ſo many judicial Proteſtations in Parliament, whereby my Action was plainly renewed, while the Right was yet current, it is impoſſible that either my Summons ſhould be underſtood to be fallen, or that theſe Deeds of Interruption done while the Right was current, ſhould become irritat by the ſuperveining act of Parliament: So that all this Anxiety for the time from whence the Preſcription is to be computed, is to no purpoſe, ſeing ~~asto~~ the Preſcription were to be counted from the 1606, yet it was interrupted validly, according to the Law ſtanding in the 1630, from whence there begun a new Courſe of Preſcription, in which time, and while my Rights were yet current, my judicial Proteſtations were new Interruptions, which were not reſcinded by the Act of Parliament 1685, nor is my Summons at all in the terms of that Act, ſeing I do not make uſe of that Summons, and the Executions nakedly as the Ground of that Interruption, but in Conjunction with my judicial Proteſts, which your Lordſhips have ſuſtained, and againſt which the Petitioner neither does, nor can alledge any thing ſolidly.

But then the Petitioner proceeds, and having cited the words of the Act of Parliament 1617, as far as they are judged to the purpoſe, argues firſt, *That the Act ſtatutes and declares, and therefore might have a Retroſpect. 2do. That the Retroſpect is in terminis expreſſed, that whoever have bruiked heretofore, &c. And, 3tio. The Commencement of the bruiking is expreſſy fixt upon the date of the Infeſtments or Titles* (which by the by the Petitioner would have paſs for equivalent terms) and therefore the Petitioner ſubſumes, *That he and his Predeceſſors bruiked the Precedency in queſtion before the 1617, for 40 years, and therefore, &c.*

It is answered, That the Petitioner does very ſtrangely miſtake the Act of Parliament: The words whereof are, *That whoſoever have bruiked heretofore, or ſhall bruik in time coming, for the ſpace of 40 years continually*: Which plainly comprehends two ſeparat Caſes and no more, viz. Such as have bruiked 40 Years heretofore, and ſuch as ſhould bruik 40 Years in time coming, and conform to theſe two Caſes, the Law ſtatutes diſtinctly & differently, viz. *As to ſuch as had bruiked full 40 years*: That Act indeed does introduce a Preſcription, but quarrelable within 13 years, and as to ſuch who ſhould in time coming poſſeſs 40 years without Interruption, The Act introduced the Preſcription of 40 years. Beſides theſe two Caſes, the Act of Parliament has taken notice of no other, and no doubt your Lordſhips will be tender in a Caſe which concerns Property in general, to admit of any Novelty.

But, 2do. The Act of Parliament expreſſy mentions the Title of Preſcription, viz. *Heritable Infeſtments*, for which the Petitioner craves leave to ſubſtitute Titles; but this precarious Alteration is in too material a part, ſeing the Title of *Heritable Infeſtments* demonſtrats, that the Act of Parliament is reſtricted

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to Heritable Rights of Lands, and does not concern Titles and Dignities, which are conveyed without Service or Infeftment.

And as to the Inferences in the Petition from the said Act; And first, That the Act declares and statutes, from whence the Petitioner pretends to infer a Retrospect, as if that Propriety of Speech were always observed in the Acts of Parliament: Are not these Terms to be found in the Act 6. and 18. Parliament 1621, and in many other places, where yet for certain there was a new Rule established, and no retrospect? *2do.* The words *whoever has bruiked heretofor*, are to be constructed with the words *for the space of 40 years*; for there is no other time exprest, and it is with all respect very incongruous to say as the Petitioner does, Page 4. in the beginning, *That the Petitioner has bruiked before the 1617. for 40 years*, seing the Period he pleads for is only the year 1606. If it were needful to confirm what is so plain, the last Clause in the Act concerning the 13 years, makes it clear to a Demonstration, and Sir George Mackenzie upon that Act, Observation 7. says, *That by this Act, the Prescription was drawn back in favours of those who had posselt 40 years prior to the Act; for drawing back whereof nothing can be answered, &c.* So that tho there be a Retrospect, yet it is a Retrospect as to a particular Case, *viz.* where 40 years were run compleat before the Act, and in that Case the Prescription was to be counted from the Date of the Right, but as to the Prescription in time coming, it required 40 years Possession, subsequent to the Law, conform to the Rights: And it is a Mistake that the Act of Parliament fixes the Commencement of the Prescription upon the Dates of the Rights, but requires that the Possession should be conform to a Right: And it is well known, that a Right, tho disputed for 100 Years, may thereafter acquire strength by a prescription, tho the Prescription begins 100 years later than the Date of the Right,

The Petitioner having by mistake imagined that Prescription is to be carried always as high as the Date of the Right, tho, as has been said, Prescription may begin by an Accidental Occasion, much recenter than the Date of the Title, and that the Act of Parliament is plainly a supervenient accident giving Rise and Birth to the Prescription. The Petitioner goes on to prove that the Prescription begun before the 1617, was therein included, because of the Declaratory part of the Law, but especially because the Petitioner thinks it hard, that the preceeding Possession should be lost, and states the Case, *Supposing that a Party had posselt 39 Years, it availed him nothing, unless he should possess yet 40 more, making 79.* But first, what would have been the Case, if the Act of Parliament had never been made? Then no length of time would have secured where there was not a sufficient Title: And indeed in plain Sense, it's evident that the Years, before the Act of Parliament, were included in no Law, and therefore a Party possessing 39 years, had yet an Advantage by the supervening Law, in as far as by the course of 40 years, he could acquire a Right, which he could not have done before. But *2do.* Suppose the Case, that a party had posselt 39 years 365 days before the Act of Parliament 1617, Can any man free of Byass believe, that that Right expired the very next day after the Act of Parliament? Or is it consistent with Reason, that he who had posselt full 40 years by an heritable Right, should yet be quarrelled within the 13 years; But he that had posselt 40 years all to one day should have the benefit of the Prescription upon

pon the very passing of the Act of Parliament? To which, tho the Petitioner, page 7. pretends to make a plain Answer, yet it is impossible, and the weakness and Constraint of the Answers, do sufficiently demonstrat how far it is from being a plain Case, as the Petitioner would have it.

But then the Petitioner insists upon the Authority of Decisions, and concludes, *That it's needless to multiply more Practicks, where both the Reason of the Law, and the exprefs Words of the Law, and the hail current of our Practicks appear to be so evident.*

But to this it is Answered, First, That in all this matter, the Petitioner struggles for a Retrospect, which altho the Act of Parliament 1617, has in one Case Establish'd, viz. Where there was 40 years Possession Compleat and out-run before the date of the Act; yet from thence, to argue and infer more Retrospects in different Cases, against the common maxims of Law, whereby Laws *futuris dant normam negotiis*, and against the exprefs Laws of this Kingdom, which declare, that Laws should be extended *ad futura* and not *ad preterita*, Act 19. Par. 10. Ja. 6th. and Act 182. Par. 13. Ja. 6th. I say, to squeez out a further Retrospect in a different case not exprest, were certainly groundless.

2do. These Practicks are only to be regarded, where the question it self is Determined; but so it is, that in none of the Decisions cited, is this question, or the Importance of the Act of Parliament 1617, so much as debated.

3tio. More particularly, it is Answered to the Decisions. And First, to that upon the 18 December 1623 *Monimusk* contra *Forbes*, where the exception of 40 years Possession was sustained, to induce a Prescription against the Pursuer, albeit when the Possession begun, the Right might have been quarreled: Your Lordships may observe, that there is not one Word of the Act of Parliament 1617, and the case there decided, might probably have been, That *Forbes's* Author being a Trustee for *Monimusk*, had nevertheless Disposed to the said *Forbes* and *Monimusk*, neglecting to intent any Action upon the Backbond for declaring the Trust, did suffer *Forbes* to possess for 40 years, in which case no doubt there was a Prescription against the Pursuer, but then that Prescription is not founded upon the Act of Parliament 1617, nor does the Decision say so; but upon the 29 Act. 5 Par. Ja. 3d. concerning Obligations to be followed within 40 year, or else to prescribe: And in like manner, put the case that *Monimusk* had had an Inhibition against *Forbes's* Author, for security of any Debt, and had neglected to intent Reduction within the 40 year, no doubt there did arise a Defence of Prescription against him who had neglected his Right, whilst another had a Right so long cloath'd with Possession: But still this prescription depended not up the Act of Parliament 1617. Seing therefore, the Decision is not founded upon the Act of Parliament exprestly, and might very congruously be understood upon Prescriptions of Obligations, introduced by Acts long prior to the Act founded on; it does not at all prove for the Petitioner.

2do. The Decision 7 December 1633, The Paroch of *Aberskerder*, against the Paroch of *Gemrie*, is nothing to the purpose: For the Prescription there mentioned, is not of an Heretable Subject, but of a Bell: besides it is a Prescription of the *actio commodati*, the Paroch of *Aberskerder* having lent the Bell to the Paroch of *Gemrie*, and neglected to intent Action on the Personal Obligement, implied.

implied to Re-deliver within the 40 years, which depended upon the foresaid Act of Parliament *James 3d*, and not upon the Act of Parliament 1617.

3^{to}. The Decision the 28 November 1665, *Younger contra Johnston*, is nothing to the purpose; For tho the Lords found the Service, which had been obtained in the 1608 good, and that the Reduction upon the Service 1655 was prescribed, yet they did not find that the Prescription run from the 1508, neither was it needful, for though *Stephen Porteous* was served in the 1655, which was two years within the Prescription, counting from the 1617, yet the Service was no Interruption; and it does not appear, that the Reduction was intended untill the 1665 which was 48 years from the Act of Parliament; and my Lord *Stair* Observes after all, That the Prescription was not sustained upon the first part of the Act of Parliament 1617, but upon the Clause concerning the prescription of Actions in general, which the Lords found extended to Reductions of Retours: And which truly might as well have been sustained upon the Ancient Acts of Parliament, anent Prescription of Obligations, seeing that Act was Extended to Testaments long before, as *Durie* Observes 19 June 1627, *Lindsay contrar Balnagoun*, and the foresaid Acts might certainly as Congruously be extended to Actions concerning Retours, as to Testaments.

4^{to}. As to the Decision 14 July 1675, The Colledge of *Aberdeen* contra Earl of *Northesk*, it is well to be noticed, that neither did the Lords in that case find, that the Prescription was current from the 1612, nor was it needful, seeing there was 58 years run, counting from the Act of Parliament 1617.

The Decisions being thus taken off, for clearing my Answers yet further, I shall beg leave to suppose, that the Act of Parliament 1617, had only found and Declared, That whosoever should in time coming, possess 40 years conform to their Heretable Infeftments, would there have been any place, for this constrained Retrospect urged for the Petitioner? Certainly no. If then the Act of Parliament has added but one case more, there is still no place for the Retrospect, unless the Petitioner were in that case, viz. As having possess 40 years uninterrupted before the Act of Parliament, which is impossible upon the Act of Ranking 1606.

Upon the whole matter, it is evident, That the Petitioner's single Alledgance resolves in a Retrospect. 2^{do}. That Retrospects being against Law and common Rules, are never to be assisted by Interpretation, nor to be presumed where they are not in the most positive and clearest terms exprest. 3^{to}. Especially *in materia odiosa*.

*In Respect whereof, the Desire of the Petition
ought to be Refused.*

AB of Parliament, 1917, and not upon the AB of Parliament 1917.



A circular library stamp from the British Museum. The outer ring contains the text "BRITISH MUSEUM" at the top and "15 SEP 66" at the bottom. The center features a heraldic crest with a shield, topped by a crown and flanked by two lions. Below the crest, the word "SEP" is printed.

When the whole matter is considered, it is evident that the position of the Government is a very strong one. The Government is not only in the right, but it is also in the position of a victor. The Government is not only in the right, but it is also in the position of a victor. The Government is not only in the right, but it is also in the position of a victor.

To Reflect on the Degree of the Tension
ought to be Reflected.

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